CASE NO. 87-509
&
CASE NO. 87-510

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

THE MIAMI HERALD PUBLISHING COMPANY

Petitioner,

vs.

JOHN W. HAGLER and
STATE OF FLORIDA

Respondents.

PALM BEACH NEWSPAPERS, INC.,

Petitioner,

vs.

JOHN W. HAGLER and
STATE OF FLORIDA

Respondents.

MOTION TO PROCEED IN FORMA PAUPERIS

Respondent, JOHN W. HAGLER, by and through his undersigned attorney, respectfully moves this Court to permit him to proceed in forma pauperis, based on the attached affidavit. Respondent's counsel in the United States Supreme Court is representing Respondent pro bono.

I HEREBY CERTIFY that a true copy of the foregoing Motion to Proceed In Forma Pauperis has been furnished by U.S. Mail on

this 26th day of October, 1987 to the following:

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Respondents.

AS TO
RESPONDENT JOHN W. HAGLER
ONLY

RESPONSE
TO PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL OF FLORIDA

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QUESTION PRESENTED FOR REVIEW

As to
The Miami Herald Publishing Company

Whether the press has a First Amendment right to obtain transcripts of discovery depositions in a criminal case, when neither the prosecutor or defense counsel intend to have the depositions transcribed and filed with the court, or to make any use of the depositions at trial or in any other court proceeding in the case.

As to
Palm Beach Newspapers, Inc.

Whether the press has a First Amendment right to attend pretrial discovery depositions being taken by an accused's lawyer as part of counsel's investigation of the facts and of potential defenses, or as part of counsel's preparations for court proceedings in the case.

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AS TO
RESPONDENT JOHN W. HAGLER
ONLY

RESPONSE
TO PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL OF FLORIDA

Respondent John W. Hagler respectfully prays that this Court decline to issue writ of certiorari to review the opinion of the Fourth District Court of Appeal of Florida in **Miami Herald Publishing Company and Palm Beach Newspapers, Inc. v. Hagler**, 471 So.2d 1344 (Fla. 4th DCA 1985).

OPINIONS IN THE COURTS BELOW

The order of the Florida trial court is not reported. The order was entered by the Circuit Court of the Fifteenth Judicial Circuit, which is the felony criminal trial court in and for Palm Beach County, Florida, in the case of **State of Florida v. John Hagler.** It is reprinted in the Joint Appendix of Petitioners at A. 74-83.

The opinion of the state appeals court affirming the trial court's order was entered by the Fourth District Court of Appeal of Florida in **Miami Herald Publishing Company and Palm Beach Newspapers, Inc. v. Hagler,** which appears at 471 So.2d 1344 (Fla. 4th DCA 1985). It is reprinted in the Joint Appendix of Petitioners at A. 72-73.

The opinion of the Florida Supreme Court denying certiorari review of the District Court's decision is **Miami Herald Publishing Company and Palm Beach Newspapers, Inc., v. Hagler,** found at 506 So.2d 1037 (Fla. 1987). It is reprinted in the Joint Appendix of Petitioners at A. 70-71.

QUESTION PRESENTED FOR REVIEW

Drawing from the facts of this case, and based on the legal issues actually presented to the state trial and appellate courts below, the question presented for review is as follows:

As to
The Miami Herald Publishing Company

Whether the press has a First Amendment right to obtain transcripts of discovery depositions in a criminal case, when neither the prosecutor or defense counsel intend to have the depositions transcribed and filed with the court, or to make any use of the depositions at trial or in any other court proceeding in the case.

The question presented by the Miami Herald Publishing Company is expanded by Palm Beach Newspapers, Inc., to include the following additional feature:

As to
Palm Beach Newspapers, Inc.

Whether the press also has a First Amendment right to attend pretrial discovery depositions when they are being taken by an accused's lawyer, as part of counsel's investigation of the facts and of potential defenses or as part of counsel's preparations for court proceedings in a criminal case.

JURISDICTION

Respondent John Hagler accepts the citations of the respective Petitioners as to the statutory provisions believed to control the question of jurisdiction.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

Respondent John Hagler accepts the recitations of the respective Petitioners as to the constitutional provisions and rules involved.

STATEMENT OF THE CASE

John Hagler was arrested in Riviera Beach, Florida, in 1982, in an undercover "sting" operation. Known as "Operation 30-30," the sting was conducted by joint effort of three law enforcement agencies: i.e., the West Palm Beach Police Department, the Palm Beach County Sheriff's office, and the State Attorney's (or "District Attorney's") office for Palm Beach County, Florida.

Operation 30-30 centered around a confidential police informant who was set up in business in a warehouse located in Riviera Beach, rented by the three law enforcement agencies. For a period of six months the informant purchased stolen goods from all comers. During that six months all meetings and conversations between the informant and any other persons occurring at the warehouse were video-taped on hidden camera systems in the warehouse, and all telephone conversations to or from the warehouse were tape recorded. In the end, Operation 30-30 resulted in over 125 criminal cases being made.

The object of Operation 30-30 was stolen goods and those who sold them. The type crime for which John Hagler was arrested, however, did not involve stolen goods. He was arrested for sale of cocaine. In essence, he was arrested for coming to the ware-

house and, while unbeknownst to him being secretly video-taped, giving a free "sample" of cocaine to the informant. The sample was intended, supposedly, to indicate the quality of cocaine that could be produced by Hagler for the informant in a bigger transaction being negotiated, although no such later transaction ever occurred.

As a matter of routine, and pursuant to Florida's rules of court, John Hagler's lawyer took a pretrial discovery deposition of the confidential informant. At that deposition the informant testified that Hagler, before giving him the cocaine, made many visits to the warehouse trying to sell the informant photographs of Palm Beach County State Attorney David Bludworth with an unidentified woman. [This was the same State Attorney whose office was a participant in the multi-agency sting operation, and whose office now was prosecuting the case against Hagler.] The informant testified Hagler told him the photographs could be used as "bargaining chips" to influence Bludworth in the pending criminal charges against the informant himself. The implication was that Bludworth was vulnerable to such persuasion because he was campaigning at that time for the United States Senate.

The informant never purchased the photographs from Hagler, though he did engage Hagler in "negotiations" for purchase throughout the period of the sting operation. Instead, the informant ended up discussing with Hagler a cocaine transaction, which eventually resulted in Hagler delivering the sample to the informant, on hidden camera at the warehouse.

The informant's deposition, at which he related these things, was attended by reporters for the news media, and was reported to the public.

After completing the informant's deposition, Hagler's lawyer subpoenaed the State Attorney, David Bludworth, for deposition. Hagler's lawyer, pursuant to the rules of court, served a notice of the time and place for that deposition upon the particular Assistant State Attorney actually handling the case -- and filed proof with the court, of his required notice to the prosecutor, by filing a copy of the notice with the clerk of court.

Prior to the date of the deposition, the State Attorney's office contacted Hagler's counsel and requested to reschedule the deposition to a later time, which the defense lawyer agreed to, with an understanding the State Attorney would appear by mutual agreement without necessity of being resubpoenaed. No written notice of the taking of the reset deposition was given to the prosecutor, since the reset was done at the prosecutor's request and the parties had mutually scheduled it.

Newspaper reporters employed by Palm Beach Newspapers and the Miami Herald, among others, had seen the original notice in the court file and planned to attend. The day before that scheduled deposition reporters contacted Hagler's lawyer to confirm it still was going, and learned that the deposition had been rescheduled to a later date at the request of the prosecutor's office. When the press asked when it was rescheduled for,

Hagler's lawyer told the press he had agreed to honor the prosecutor's request not to advise the press.

On August 23, 1983, David Bludworth, State Attorney, personally appeared before Michael Greenhill, Court Reporter, and gave his deposition, as required by **Rule 3.220(d), Florida Rules of Criminal Procedure.**

The press, upon learning a few days later of the taking of Bludworth's deposition, asked the court reporter to type the transcript at their cost. The court reporter declined to type the transcript unless one or the other party to the case, for whom he had recorded the deposition, authorized him to type it and release it to the press. Neither the State Attorney's office nor defense counsel for John Hagler would authorize the court reporter to do so.

Neither party ordered the deposition transcribed for their own use.

The Miami Herald Publishing Company and Palm Beach Newspapers, Inc., filed a motion with the trial judge seeking an order permitting the press to obtain a copy of the deposition given by State Attorney David Bludworth, and also asking the court to order the prosecutor and defense counsel to file notice of all future depositions, and to prohibit either party from denying the press the right to attend when the depositions are being taken unless one party or the other first procures a court order specifically authorizing exclusion of the press.

The press contended, as grounds for the relief sought, that the procedure surrounding the taking of Bludworth's deposition violated the Florida Rules of Criminal Procedure, violated a local administrative order of the trial court itself, and violated the press's "First Amendment and Florida Common Law rights to attend judicial proceedings."

[Only the question of a "First Amendment . . . right to attend judicial proceedings" raises a federal constitutional question reviewable by the United States Supreme Court. The remaining grounds are all questions purely of state law.]

The trial judge denied the press's motion, outright. The judge even declined to hear evidence from the State Attorney's office in support of excluding the press. The judge said the threshold question was whether the public and press had any right to attend pretrial discovery depositions in a criminal case in the first place. And on that question, the trial judge entered a written order holding that the First Amendment confers no right upon the general public or its alter-ego, the press, to attend pretrial discovery depositions. The judge also wrote,

> In closing, this Order should not be construed as any restraint upon the movants [i.e., Palm Beach Newspapers, Inc., and the Miami Herald Publishing Company] to pursue their First Amendment freedoms through the use of their broad investigative powers and resources, but without the benefit of the Bludworth deposition. If and when that deposition is used in a court hearing or trial, or is filed with the Clerk of this court, it will then become a public record of this court, readily accessible to the public, unless sealed by an appropriate court order after full compliance with [the local court's admin-

> istrative orders regulating procedures for procuring such an order] and a showing of "good cause" as required by **State v. Newman**, 405 So.2d 971 (Fla. 1981) and meeting the three prong test of **Palm Beach Newspapers, Inc., v. Nourse**, 413 So.2d 467 (Fla. 4 DCA 1982).
>
> Joint Appendix of Petitioners, at page A. 83

The press appealed the trial court's ruling to the Fourth District Court of Appeal of Florida. The District Court of Appeal affirmed the trial court's order. **Miami Herald Publishing Company and Palm Beach Newspapers, Inc. v. Hagler**, 471 So.2d 1344 (Fla. 4th DCA 1985).

The press then sought, and was denied, review by writ of certiorari in the Florida Supreme Court. **Miami Herald Publishing Company and Palm Beach Newspapers, Inc. v. Hagler**, 506 So.2d 1037 (Fla. 1987).

The press now seeks review in the United States Supreme Court, by writ of certiorari to the Fourth District Court of Appeal of Florida.

STATEMENT OF REASONS WHY WRIT OF CERTIORARI SHOULD BE DENIED

Writ of certiorari should be denied. The decision of the state appeals court below has not decided an important question of federal law in a way that conflicts with a decision of another state court of last resort. Nor has the state appellate court decided an important federal question in conflict with any decision of a federal court of appeals. The Florida appellate court also has not decided an important question of federal law which has not yet been but needs to be settled by the United States Supreme Court, and it has not decided a federal question in conflict with any applicable decisions of the United States Supreme Court.

None of the "conflicting" appellate court decisions, out of federal or state courts, which are relied upon by the press, even deal with the specific issue presented in this case. Not a one of them holds, point blank, that the taking of pretrial discovery depositions in a criminal case is a judicial proceeding to which the public and press have a First Amendment right to attend.

All the appellate decisions relied on by the press deal either with court-ordered closure of trial court proceedings or prior restraints on what the press may publich -- and, so, all are readily distinguishable.

[The only conflicting decisions, on point, that the press do cite are decisions of other Florida **trial** courts -- and all those decisions predate the appellate decisions of the Florida District

Court of Appeal and the Florida Supreme Court in **Hagler** and the companion cases that Petitioners now seek to have reviewed by the United States Supreme Court.]

The **Hagler** and companion cases that Petitioners seek to have reviewed are, it seems, the only cases dealing with the precise issue at hand. And those rulings are uniform and clear. They apparently are the only cases that deal specifically with the question whether there is a First Amendment right of press access to pre-trial discovery depositions in criminal cases, and they uniformly hold that the press has no First Amendment right to attend, or to obtain copies of, pretrial discovery depositions in a criminal case -- not until such time as one party or the other to the criminal case does something to make those depositions part of the trial court's official record, or uses the depositions in any part of the court proceedings.

There is an absence of any conflict or confusion in the law, so far as it concerns the precise questions presented. Or, to say it another way, there is no "conflict" such as would require resolution by the United States Supreme Court.

It is not a matter of conflict or confusion in the law, but, rather, of conflict between what the existing law on the subject is, and what the professional press would like for it to be; and the latter just is not grounds for granting writ of certiorari.

It also should be noted that there is no conflict between the state court's decision below, and the wording of the First Amendment itself, which speaks in simple words, albeit tremen-

dously important ones. The First Amendment says, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

Those words say nothing about press **access** to anything, except to the public with whatever story the press has and wishes to tell. The First Amendment nowhere addresses a right of access to a story. It addresses **the right to publish** to the general public whatever facts, whatever story, whatever opinions, whatever arguments the press does have and does desire to disseminate.

Granted, the press-access question presented here is of great importance to the press in terms of its ability to get stories. The press-access issue involved here certainly should to be of concern to the public, too, for all the reasons outlined by the press in their arguments to this court. But it does not follow that the issue is, ipso facto, a federal question of law, as opposed merely to a current public policy question of great importance.

The following is the heart of the press's argument for certiorari review: The Supreme Court should speak to this subject because it is an important public policy question of the moment. The main emphasis of the press's argument is that there are strong public policy reasons for a right of press access to pretrial discovery depositions in criminal cases, because 97 % of all criminal cases today are resolved by plea agreements, arrived at after the lawyers have completed their depositions of witness-

es and potential witnesses and others possibly having relevant background on the case. And so, if the press and public are to remain fully informed about the criminal justice system, there is a need for the public to know what factors influence the final plea agreements disposing of so many cases.

[Of course, if the same high rate of case dispositions by "plea bargains" holds true in jurisdictions where pretrial depositions are not routinely done as they are in Florida state courts, then the logic of the press's argument falls flat. But, nonetheless . . .]

Those public-policy arguments are persuasive ones. Yet, they are not based on the First Amendment, or on court decisions interpreting it. They merely are part of an important contemporary public policy debate, which just is not the same as being part of any unresolved or difficult question of federal law. They are more appropriately addressed the the United States Congress and the various state legislatures.

The suggestion of "ripeness" for review of this subject, made by at least one of the petitioners, is merely another aspect of the same argument by the press. It is "ripe" for resolution only by reference to the contemporary condition of criminal court case loads, and by reference to the necessity and practice of disposing of 97 % of cases by plea agreements; but, it is not shown to be "ripe" for decision by reference to any current unresolved, or disputed, case law as to a federal constitutional question concerning the practice.

It is true, as the press contends, that when criminal cases are resolved by plea bargains, without full-blown trials, the public gets less facts about the cases. But the same holds true for the courts themselves, too. When cases are disposed of through plea agreements, the courts hear less facts, and see less evidence addressing guilt and innocence. Still, whatever facts the courts do get -- or, more accurately, whatever factors are brought before the courts to bear on the administration of justice (e.g., to cause the courts to accept the terms of plea agreements) -- are all matters of public record and public proceedings fully open to the public and press.

One might wonder whether, if a constitutional case is to be made for the press's position, it could be made more appropriately by reference to the "public trial" provision of the Sixth Amendment. The Sixth Amendment specifically guarantees to every criminal accused citizen a fair and "public" trial by impartial jury. But a Sixth Amendment argument was never litigated in the state courts in this case, and is not the question that Petitioners seek to have addressed by the United States Supreme Court in this case.

CONCLUSION

Neither the case authorities relied on by the Miami Herald Publishing Company and Palm Beach Newspapers, Inc., nor the wording of the First Amendment itself, conflict with the lower court's holding on the question of whether the First Amendment gives the press a guaranteed right of access to pretrial dis-

covery depositions in criminal cases. While the question presented clearly is one of importance in terms of what is sound public policy, it is not a question of federal constitutional law. Federal and state court appellate decisions reflect no conflict or confusion about what the First Amendment itself has to say on the subject. For these reasons, the United States Supreme Court should deny writ of certiorari.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Response to Petition for Writ of Certiorari was served on October 26, 1987, in accord with Rule 28.1 of the Rules of the Supreme Court of the United States by depositing three true copies in the United States post office, with first-class postage prepaid, addressed to:

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